

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMIGA, INC., a Delaware corporation,

Plaintiff,

v.

HYPERION VOF, a Belgium corporation,

Defendant.

No. 07-0631-RSM

**HYPERION'S MOTION TO JOIN
ITEC, LLC AS A COUNTERCLAIM
DEFENDANT**

**Note on Motion Calendar: Friday,
July 13, 2007**

Oral Argument Not Requested

I. RELIEF REQUESTED

COMES NOW defendant Hyperion VOF and moves the Court pursuant to FRCP 13(h), FRCP 19(a) and/or FRCP 20(a) to add Itec, LLC, as a counterclaim defendant. The basis for this motion is that on June 20, 2007, Itec tendered \$25,000 to Hyperion and demanded that Hyperion deliver to it the Amiga OS 4.0 software and related intellectual property, which is exactly the same property that Amiga Delaware seeks to recover in this action. (Carton Dec., Ex. A.)

II. FACTS

The Court is already familiar with the background facts of this case from its consideration and resolution of Amiga Delaware's motion for preliminary injunction. On June

**HYPERION MOTION TO JOIN ITEC, LLC AS COUNTERCLAIM
DEFENDANT - 1**

Cause No: 07-0631-RSM

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20, 2007, Itec, LLC, served Hyperion with a letter, allegedly signed by its Secretary John Grzymala. That letter was accompanied by a check for \$25,000 and a copy of the 24 April 2003 agreement between Itec, LLC and Hyperion VOF. The letter contained a demand that Hyperion deliver to Itec the OS 4.0 software. (Declaration of Evert Carton In Support of Hyperion's Motion to Join Itec, LLC as a Party to the Action, at ¶2 and Ex. A.) The assertion of these rights by Itec, LLC directly conflicts with the assertion of the same rights by Amiga Delaware. (Id., ¶3.)

For many of the same reasons why Hyperion opposed Amiga Delaware's motion for a preliminary injunction, Hyperion rejects the demands by Itec, LLC for delivery of OS 4.0. Other issues, such as the now-apparent dispute between Itec, LLC and Amiga Delaware, further complicate Itec's demands for that intellectual property. (Id., ¶4.) Hyperion rejects Itec's tender of \$25,000 under the 3 November 2001 Agreement and is returning the same to Mr. Grzymala. (Id., ¶5.)

Mr. John Grzymala, who evidently signed the June 20, 2007 letter, has long been involved with and is one of the insiders of Amiga Washington, Itec, and Amiga Delaware. (*See, e.g.*, the Declaration of William McEwen In Support of Plaintiff Amiga, Inc.'s Motion for Preliminary Injunction and Motion for Expedited Discovery, Exhibit J, p. 56; Declaration of William A. Kinsel In Support of Hyperion's Motion to Join Itec, LLC as a Party to the Action, at Ex. A, ¶16.) Itec's letter, therefore, appears simply to be another part of this group's efforts to strip Hyperion of its rights and interests in Amiga OS 4.0.

III. ARGUMENT

A. STANDARDS FOR JOINING ADDITIONAL PARTIES

Federal Rules of Civil Procedure 13(h), 19 and 20 set the standards for determining when an entity, not presently a party to the action, should be required to join as a plaintiff or defendant in an action:

Rule 13(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

Rule 19(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Rule 20(a) Permissive Joinder of Parties. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. . . .

B. SUBJECT MATTER JURISDICTION, PERSONAL JURISDICTION AND VENUE ARE ALL PROPER OVER ITEC, LLC IN THIS DISTRICT

Amiga Delaware filed suit in this action in the United States District Court for the Western District of Washington under the November 3, 2001 Agreement between Hyperion, Amiga Washington and Eyetech. That Agreement contains the following provision:

7.08 Forum. The exclusive jurisdiction and venue of any lawsuit between the parties arising under this Agreement or out of transactions

contemplated hereby shall be the Superior Court of Washington for King County or the United States District Court for the Western District of Washington at Seattle and each of the parties hereby submits itself to the exclusive jurisdiction and venue of such court for the purposes of such lawsuit.

(Declaration of Evert Carton In Opposition to Amiga Delaware's Motion for Preliminary Injunction, Ex. 2, p. 45.) Amiga Delaware has claimed the benefits and obligations of this Agreement and §7.08 therein by virtue of its alleged status as a successor in interest to Amiga Washington. (Complaint, ¶4.) Since Amiga Delaware's status as successor in interest depends on the validity of the alleged transfer between Itec, LLC and it,¹ Itec must also be bound by the 3 November 2001 Agreement's jurisdictional and forum provisions designating this district as the sole location for the resolution of disputes related to the rights under that Agreement. Furthermore, diversity jurisdiction exists because Itec is a New York entity, Amiga Delaware is a Delaware entity, and Hyperion is a Belgian entity, making for complete diversity.

(Declaration of Evert Carton In Support of Hyperion's Motion to Join Itec, LLC as a Party to the Action, at ¶1 & Ex. A, p. 5; Complaint, ¶4.) There is, therefore, no jurisdictional or forum bar to adding Itec to this action.

C. ITEC'S DEMANDS DIRECTLY IMPACT THE INTERESTS OF HYPERION AND AMIGA DELAWARE THAT ARE AT ISSUE IN THIS SUIT

Itec is claiming exactly the same rights to Amiga OS 4.0 that Amiga Delaware is asserting that it owns in this suit. For its part, Hyperion denies that either of those entities has rights to OS 4.0. (See Declaration of Evert Carton In Support of Hyperion's Motion to Join Itec, LLC as a Party to the Action, at ¶¶4-5 & Ex. A.)

These direct conflicts unequivocally invoke the public policy interest in favor of ensuring that only one, unified piece of litigation is employed to resolve a common dispute.

(FRCP 13, 19 and 20.) This is driven home by the minimal revisions that need to be made to the Counterclaims to add Itec to this suit to resolve the parties' competing claims to Amiga OS 4.0. (See the redlined version of the proposed Amended Counterclaims attached as Exhibit A to the Declaration of William A. Kinsel In Support of Hyperion's Motion to Join Itec, LLC as a Party to the Action.)

IV. CONCLUSION

For all of the foregoing reasons, Hyperion asks this Court to grant its motion for permission to add Itec, LLC, as a counterclaim defendant, and to file and serve the Amended Counterclaims attached as Exhibit A to the Declaration of William A. Kinsel In Support of Hyperion's Motion to Join Itec, LLC as a Party to the Action. While it is true that FRCP 19(a) contemplates the possibility that this Court could order that Itec be added as a party plaintiff, Itec's failure to move to intervene in this matter, and the efficiency of simply adding it as a defendant, support Hyperion's motion to add Itec as a counterclaim defendant.

DATED this 26th day of June, 2007.

KINSEL LAW OFFICES, PLLC

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¹ Declaration of William McEwen In Support of Plaintiff Amiga, Inc.'s Reply to Hyperion's Opposition to Amiga's Motion for Preliminary Injunction, at ¶13 and Ex. B